STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

CAPITAL EDUCATORS ASSOCIATION 632 North Governors Avenue Dover, Delaware 19901, Petitioner, BOARD OF EDUCATION OF THE CAPITAL SCHOOL DISTRICT 945 Forest Street Dover, Delaware 19901, Respondent.	: : : : : : : : : : : :	Petition No. DS 1-11-84-3CAP

DECISION IN RESPONSE TO REQUEST FOR DECLARATORY STATEMENT

FACTS

Petitioner, Capital Educators Association (hereinafter Association) and the Capital School District (hereinafter District) executed a collective bargaining agreement on July 28, 1982, retroactive to July 1, 1981 and expiring on June 30, 1984. Included in that Agreement, at Article Ten, was the subject of class size. In accordance with Article Two of that now expired Agreement, the parties entered into negotiations over a successor agreement on or about January 15, 1984. Among the topics discussed during the ensuing negotiations was the issue of class size. The Association proposed language which adopts much of the language contained in the expired Agreement, but alters the language of sections 10:3 and 10:4 by further reducing the classroom teacher/pupil ratio. The District, while willing to retain the same language that existed in the prior Agreement, is unwilling to further reduce the classroom teacher/pupil ratio.

The parties, having declared general impasse, requested the Public Employment Relations Board to appoint a mediator under the provisions of 14 Del.C. §4014, of the Public School Employment Relations Act (14 Del.C. §§4001-4018 (Supp.1982), hereinafter the Act). Unfortunately, mediation was unsuccessful in assisting the parties in reaching agreement and so, on or about September 18, 1984, in response to a request from the Association and the agreement of the District, the Public Employment Relations Board certified the dispute for fact-finding. On November 1, 1984, fact-finding was convened with Mr. Jeffrey B. Tener, having been selected by the parties, serving as fact-finder.

During the initial meetings with the fact-finder, the District took the position that the issue of class size constituted a permissive subject of bargaining and it was not, therefore, required to submit the subject for consideration by the fact-finder.

As a result of the District's position, the Association on or about November 6, 1984, in accord with 14 Del.C. §4006(h)(1), filed a Request for Declaratory Statement with the Public Employment Relations Board.

Continuing informal efforts to bring about a voluntary settlement proved unsuccessful and the matter proceeded to a formal fact-finding hearing which included four sessions held on November 18 and 21, and December 2 and 3, 1984. At the initial session of November 18, 1984, over the objection of the Association, the fact-finder ruled that the parties would present their respective positions concerning the class size issue pending the PERB's decision in the Request for Declaratory Statement. If the decision required the class size issue to be submitted to the fact-finder

as a proper subject for his consideration, the formal record would be complete and a re-opening of the hearing for the purpose of receiving testimony and/or evidence on the class size issue would not be necessary.

POSITION OF THE PARTIES

The Association contends that the proposals of each party concerning the class size issue constitute a mandatory subject of collective bargaining under the Act. Alternatively, the Association maintains that even if the subject of class size is determined to be permissive, the fact that the issue was mutually bargained, remained unresolved, and was not withdrawn prior to the appointment of the fact-finder, the District may not now refuse to submit its proposal concerning the issue to the fact-finder. To do so, argues the Association, constitutes a violation of 14 Del.C. §4015(e).

On the other hand, the District, in support of its position, argues that based on the decision of the Delaware PERB in Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink S.D., Del.PERB, No. 1-3-84-3-2A (August 14, 1984) and the applicable public sector law in other jurisdictions, the Association's persistence in bargaining the class size issue to impasse is inappropriate and constitutes an unfair labor practice. The District also maintains that it cannot be compelled to negotiate a permissive subject of bargaining and has the right to modify or even withdraw any prior position or proposal at any time.

ISSUE

The issues to be resolved by the requested Declaratory Statement

are determined to be whether:

(1) the subject of class size, as it relates to the classroom teacher/ pupil ratio, is a mandatory subject of bargaining under the Act; and in the alternative,

(2) even if the subject of class size is determined to be a permissive subject of bargaining, the District must, nevertheless, submit its positions to the fact-finder for his determination, in accord with 14 Del.C. §4015(e), or because of the Board's continuing willingness to bargain the subject during the negotiations, up to the fact-finding process?

JURISDICTION

Regulation 6.1 of the Rules and Regulations of the Delaware Public Employment Relations Board, sets forth both the substantive and procedural requirements for the filing of petitions for declaratory statements. A review of the facts of this matter clearly indicates that ~~this~~ it meets the necessary requirements for the PERB to accept jurisdiction:

(1) there is presented an issue representing a matter involving a potential unfair labor practice;

(2) there is presented a question involving the scope of collective bargaining;

(3) there is presented a request for a clarification of §4015(e) of the Act;

(4) the issue involves parties whose interests are real and adverse;

(5) the matter is in such a posture that the issuance of a declaratory statement will facilitate the resolution of the controversy.

OPINION

The Public School Employment Relations Act, 14 Del.C. Chapter 40 (Supp.1982), at §4001(2), obligates Boards of Education and certified school employee representative organizations to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations.

Under the Act, the statutory duty to bargain pertains exclusively to "terms and conditions of employment" as defined at §4002(p)..."matters concerning or related to wages, salaries, hours, grievance procedures and working conditions...". The duty to bargain over terms and conditions of employment is not, however, without limitation. §4002(p) also contains words of limitations excluding from the duty to bargain "...those matters determined by this or any other law of the State to be within the exclusive prerogatives of the public school employer." §4002(p) categorizes those subjects which must be bargained and establishes that class of subjects which, in conjunction with 14 Del.C. §4013, the parties have no authority to bargain and are, in fact, illegal subjects of bargaining. Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink S.D., Del.PERB, No. 1-3-84-3-2A (August 14, 1984). §4005 of the Act, School Employer Rights, also excludes a different class of subjects from the mandatory bargaining requirement of §4002(p). 14 Del.C. §4005 states:

> A public school employer is not required to engage in collective bargaining on matters of inherent managerial policy which include but are not limited to such areas of discretion or policy as the programs or functions of the public school employer, its

standards of service, overall budget, utilization of technology, the organizational structure, curriculum, discipline and the selection and direction of personel.

As to matters of inherent managerial policy, the school districts may choose to collectively bargain or they may unilaterally choose not to bargain. Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink S.D. (August 14, 1984, Supra.).

It is not uncommon that educational policy decisions also frequently impact on a teacher's terms and conditions of employment, and vice versa. These two concepts are often times not readily distinguishable and there is, unfortunately, no unwavering line between the two. West Hartford Ed. Assn. v. DeCourcey, Conn.Supr., 295 A.2d 526, 534 (1972). In determining which subjects are thus excluded from the §4002(p) mandatory duty to bargain under §4005, a balancing must occur between "matters concerning or related to wages, salaries, hours, grievance procedures and working conditions" and those matters which must remain with the public school employer as "inherent managerial policy" necessary for providing the effective, efficient, orderly, and uninterrupted functioning of the public school system. Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink S.D. (August 15, 1984, Supra.).

In order to provide a reasonable standard for distinguishing mandatory from non-mandatory, or permissive subjects of bargaining, the Delaware Public Employment Relations Board established a balancing test as follows:

Where a subject in dispute concerns or is related to wages, salaries, hours, grievance procedures and working conditions,

and also involves areas of inherent managerial policy, it is necessary to compare the direct impact on the individual teacher in wages, salaries, hours, grievance procedures and working conditions as opposed to its probable effect on the operation of the school system as a whole. If its probable effect on the school system as a whole clearly outweighs the direct impact on the interest of the teachers, it is to be excluded as a mandatory subject of bargaining; otherwise, it shall be included within the statutory definition of terms and conditions of employment and mandatorily bargainable. Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink S.D. (August 14, 1984, Supra.).

While it is recognized that other states have differing rulings regarding the status of class size, it must be recognized that each ruling involves the interpretation and application of an individual state statute. Therefore, no universal rule is possible.

Under Delaware law, local school boards "shall have the authority to administer and to supervise the free public schools of the reorganized school districts and shall have the authority to determine policy and adopt rules and regulations for the general administration and supervision of the free public schools..." 14 Del.C. §1043.

The school board of each reorganized school district, subject to this title and in accordance with the policies, rules and regulations of the State Board of Education, shall, in addition to other duties:

(1) Determine the educational policies of the reorganized school district and prescribe rules and regulations for the conduct

and management of the schools; ... 14 Del.C. §1049.

The logic of the two leading cases on this subject represent, in the writer's opinion, the more reasoned approach in resolving the issue of bargaining status of class size.

The Kansas Supreme Court held class size not to be a mandatory subject of bargaining because "class size has a tremendous impact on the school district because it involves such factors as the number of classrooms and teachers needed." National Ed. Assn. - Topeka, Inc., v. USD 501, Shawnee County, Kan.Supr., 592 P.2d 93 (1979). The Wisconsin Supreme Court, in reaching a similar decision, held that "the size of a class is primarily a matter of basic educational policy and that the school board's prerogatives in making educational policy include the power to decide that class size does effect the quality of education and to set class size accordingly...the size of a class is a matter of basic educational policy because there is strong evidence that the student-teacher ratio is also a determinant of educational quality". City of Beloit v. Wisconsin E.R.C., Wisc.Supr., 242 N.W.2d 231 (1976).

This logic represented by Beloit is consistent with both the wording of the Delaware statute and the application of the State's balancing test. The legislature, rather than expressly listing which subjects are included in the terms "working conditions" and "inherent managerial policy" has left that determination to a case-by-case analysis, as differences of opinion occur. In this context, because the subject of class size does have an over-all effect on the operation of the school system as a whole, including areas such as space, staffing, and educational quality, to an extent significantly greater than its direct impact on the individual teacher, it is determined to be a permissive subject of bargaining which

the district may either bargain, or refuse to bargain, at its sole discretion.

While class size significantly effects the operation of the district as a whole, it also has potential impact upon the working conditions of the individual teacher. The extent of this impact on the "terms and conditions of employment" constitutes a mandatory subject of bargaining which must be so bargained, upon request of the employee representative.

The Association's alternate theory is basically one of waiver, based on the District's continued willingness to negotiate class size until its refusal to submit the issue to the fact-finder and involves the alleged violation of §4015(e) of the Act.

While there exists a question as to whether the District did, in fact, "negotiate" class size or merely continued to state and restate its only position on the matter, in effect refusing to bargain the issue, is immaterial to the decision and is, therefore, not pursued further.

The question raised in the instant case is whether a permissive subject of bargaining can, by the language of 14 Del.C. §4015(e) or through a theory of "waiver by conduct", be transformed into a mandatory subject of bargaining, and thereby accorded the corresponding bargaining obligations?

14 Del.C. §4015(e) states:

> The fact-finder shall hold hearings in order to define the area or areas of dispute, to determine facts relating to the dispute and to render a recommendation on unresolved contract issues.

As noted previously, 14 Del.C. §4005, School Employer Rights, constitutes an express statutory exclusion from the mandatory bargaining requirement of §4002(p). It is a "right" of the public school employer that it is "not required to engage in collective bargaining on matters of inherent managerial policy..." 14 Del.C. §4005

The Association, at page 4 of the Complaint, concludes: "At the time fact-finding was ordered, class size was an unresolved contract issue, and therefore both parties were required to submit their positions on this issue to the fact-finder for findings of fact and recommendations". This conclusions represents, at best, the Association's interpretation of the meaning of §4015(e). While 14 Del.C. §4005 expressly excludes permissive subjects from the duty to bargain, the Association would negate that right of the employer with the inference of its interpretation of §4015(e). The language of that particular section of the statute does not support an inference which is inconsistent with the express prohibition of §4005. Fact-finding is the last formal step in the dispute resolution process and represents but a logical extension of the collective bargaining process. Here also, neither party is compelled to yield. The ultimate goal throughout the process remains a voluntary and mutually satisfactory resolution of differences. 14 Del.C. §4015(k). However, faced with the Association's position, a public school employer might well be hesitant to carry on continuing negotiations concerning permissive subjects of bargaining, and thereby preclude the opportunity for meaningful and constructive compromise. Such a decision would close potential channels of communication and otherwise frustrate the overriding objective of the Act.

This argument by the Association also presents another condition having both a practical and chilling effect on the willingness of the parties to mutually resolve their differences as to permissive subjects of bargaining. Although the parties are under no compulsion to accept the recommendations of the fact-finder, the statute requires that the Public Employment Relations Board "shall forthwith publicize the fact-

finder's findings of fact and recommendations along with position statements by the accepting and rejecting parties". 14 Del.C. §4015(i). A school district could therefore be placed in the position of having to publicly explain and possibly defend its bargaining positions as to matters concerning which there never existed a duty to bargain from the beginnning. While the statute protects and provides for the public's right to know, that right cannot be substituted for, used for leverage, or otherwise diminish the express right of the employer under 14 Del.C. §4005.

It is determined that a party desiring to withdraw a permissive subject of bargaining from the fact-finding process, and which does so in a timely manner, effectively removes that subject from the list of unresolved contract issues being submitted for review and recommendation.

Application of similar logic compels a like determination as to the Association's argument of the District's waiver of its §4005 rights by its conduct during the negotiations. Either party may undertake good-faith bargaining concerning a permissive subject of bargaining without forfeiting its right to, at a later point, refuse to bargain further or, in fact, to withdraw its proposals and remove the subject from the negotiations entirely. To rule otherwise and sustain a claim of waiver based on a course of collective bargaining would penalize the moving party for endeavoring to reach agreement by consenting to bargaining upon such issues as to which the Act does not require him to bargain. Kit Mfg. Co., 9th Cir., 365 F.2d 829 (1966). The Fourth Circuit Court of Appeals held that:

> A determination that a subject which is non-mandatory at the outset may become mandatory merely because a party had exercised this freedom [to bargain or not to bargain] by not

rejecting the proposal at once, or sufficiently early, might unduly discourage free bargaining on non-mandatory matters. Parties might feel compelled to refect non-mandatory proposals out-of-hand to avoid risking waiver of the right to reject. N.L.R.B. v. Davison, 4th Cir., 318 F.2d 550 (1963).

This rationale presents the only logical course to follow.

CONCLUSIONS OF LAW

Based on the foregoing, I make the following conclusions of law:

1. The Capital School District is a Public School Employer within the meaning of §4002(m) of the Act.
2. The Capital Educators Association is an Employee Organization within the meaning of §4002(g) of the Act.
3. The Capital Educators Association is the Exclusive Bargaining Representative of the School District's certificated professional employees within the meaning of §4002(j) of the Act.
4. The subject of class size, as it relates to the classroom teacher/pupil ratio, is a permissive subject of bargaining under §4005 of the Act.
5. Neither the provisions of §4015(e) nor the conduct of the parties during the course of negotiations, compels the School District to submit the issue of class size to the fact-finder for his determination.

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